

INTERNATIONAL UNION OF LATIN NOTARIES

XXII INTERNATIONAL CONGRESS OF LATIN NOTARIES

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TOPIC I

THE ROLE OF THE CIVIL-LAW NOTARY FACED WITH THE DEMANDS OF THE STATE, PARTICULARLY IN THE ADMINISTRATIVE AND TAX AREAS

CONCLUSIONS

(Translation)

1. One of the salient traits of the present time is the increasing State control of the citizens, to insure the performance of their obligations. To this end, the State sometimes requires the co-operation of specific individuals, having been discharged certain duties to expedite such control. These duties are true public charges, that can have either a real or a personal nature, but which are always obligatory. The former should conform to the principles of equality, legality, equity and proportionality and the latter, in addition, to the principles of reasonableness, timing, freedom of charge, no exchangeability, certainty, determination, subsidiarity and administrative co-ordination.

The Notary's duty to cooperate with the State derives from the very nature of his function, in his double and indivisible condition as a professional of the Law entrusted with a public duty. Nevertheless, such duty should be governed by the above mentioned principles.

2. The Notary is a legal expert qualified to authenticate instruments and contracts signed by the parts, to draft documents in a proper manner and advise such persons as may request his services. Therefore, the essence of the notarial function does not include the assessment, collection, withholding or payment of taxes, which are the duties of the tributary authorities.

It is a wish of the Notaries organizations that this kind of the notaries should be with the most exceptional character that the circumstances of each country will allow. In exercising such tasks the Notary should only have a subsidiary responsibility and liability and should never be responsible or jointly and severally liable.

3. A point that should be borne in mind is that, to achieve its purpose, the relationship established between a client and the Notary should essentially be based on trust. If the duty of co-operation with the State becomes too intense and overwhelming, such purpose could be thwarted, the trust relationship shaken and the Notary may well become, instead of an authenticating figure, a prying public official whose primary mission would be to protect the interests of the Public Treasury instead of legal security of the individuals.

In addition, it should also be remembered that the legal status of this kind of public official is determined by the duties with which he is entrusted. In his own field, the public nature of the duties strengthens the Notary's position as a legal expert. This is why the duty of co-operation imposed on a Notary should not affect the main purpose of his job, which is to give security to the legal transactions of individuals. Likewise, that duty should fulfil the requirements set forth in paragraph 1, most of which are included in the National Constitution.

4. In order to properly apply the tax regulations which the Notary must interpret, they should be certain, permanent, reasonable and clear, as any other legal provision must be. To that end, it will also be particularly useful for both part/s if the lawmaker requests the opinion of Notaries organization concerning the terms in which the law will be sanctioned.

5. The highest organizations of Notaries should cooperate with local institutions to lobby for, and secure, the drawing up of clear, accurate rules concerning such co-operation by the Notary without disturbing his essential attesting duty nor to the labors preceding the preparation of the notarial instrument and the ones that come from its existence.

6. The duty to report to the national treasury is not, in principle, against the basis of the notarial function. The tax administration has a legitimate interest to become familiar with the content of the taxable instrument and contracts which the Notary certifies. But that does not mean that the professional secret becomes abolished.

Without detriment to the administration's legal power to obtain information when it is appropriate, the immunity of the professional secret should be respected, concerning the information that the Notary receives from his clients on a confidential basis.

7. Notaries cannot be indifferent to the social evil represented by the legitimisation of illicit assets (money laundering). It is reasonable for the State to impose on Notaries the duty to report any acts suspected of being a cover for money laundering; but this is only admissible when such acts are precisely defined by the authorities and not left to the personal opinion of the Notary. It should also be pointed out that, due to the nature of his work, a Notary would be very unlikely to know the source of the funds involved in the transactions he certifies.

8. The obligation to check compliance with specific administrative requirements does not run counter to notarial duties when it seeks transparency in legal instruments or evidence of the actual structure of the business, above all to protect the consumer or the weaker part in the transaction involved. The same applies when notarial duties are checked for compliance with requirements affecting the validity or regularity of the act or business deal evidenced by the instrument. On the other hand, it is not within the authority of the State to determine that Notaries shall check compliance with the administrative obligations or tax

liabilities of people requesting their professional services, if such obligations and liabilities are unrelated to the legal act being attested to.

9. On the basis of the experience gathered in various countries, it may be said that notarial organizations are in a position to cooperate effectively with the State in the administration and management of issues closely related to their activities, such as archives of protocols, registers of wills, commercial registers, registers of *rights in rem* over unmovable property capable of registration and others that, due to their close relationship with the activities of the profession, allow the Notary, by so doing, to help strengthen legal security.

10. The positive results reached in countries whose laws provide for and regulate the involvement of Notaries in non contentious proceedings (voluntary jurisdiction), represent an incentive and an excellent argument for notarial organizations in other countries to promote such involvement as a means of expediting the administration of justice. It would relieve courts of minor administrative tasks, replacing the judge in all matters not requiring the specific authority of the court, such as, for instance, when it lays down a specific rule by pronouncing judgement, and taking advantage of the attesting power of the Notary in all procedural steps required to reach a declaration of rights according to law. To take merely procedural routine matters away from the courts and substitute the court clerk with the Notary would allow more attention to be devoted to adversarial proceedings and let the courts concentrate their efforts on administrating justice.

11. The distinctive features of his activities place the Notary in a unique position to take part in alternative dispute resolution procedures, whether as a secretary to the arbitral tribunal or as a mediator or in a similar role. The same applies to his participation in the supervision of elections, as evidenced in the countries where this practice already put into practice.